No. 87-1629

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMERICAN SIGN & INDICATOR CORP., *ET AL.*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are sixty corporations[1] engaged in interstate commerce, including activities in the State of Washing-

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[1] American Sign & Indicator Corp., Anderson, Clayton & Co., Anderson Clayton Foods, Anheuser-Busch, Incorporated, Apple Computer Inc., A & W Bottling Co. of Seattle, Inc., Bandag Incorporated, Bridgestone (U.S.A.), Inc., Brown & Williamson Tobacco Corp., Brunswick Corporation, Chicopee, The Coca-Cola Company, Darling-Delaware Company, Inc., Down River Forest Products, Inc., Eastman Kodak Company, Ecko Products, Inc., Encyclopaedia Britannica, Inc., Ethicon, Inc., Frito-Lay, Inc., Gaines Foods, Geo. A. Hormel & Co., Giurlani U.S.A., Glaco Corp., Golden Grain Macaroni Co., Inc., Herman Miller, Inc., Hewlett-Packard Company, Janssen Pharmaceutica, J.I. Case Company, Johnson & Johnson Baby Products Company, Johnson & Johnson Dental Products Company, Johnson & Johnson Products, Inc., Kellogg Sales Company, Levi Strauss & Co., Marshall Field & Company, McNeilab, Inc., Monroe Auto

ton that subjected them to the Washington business and occupation tax struck down by this Court in *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 107 S. Ct. 2810 (1987). Like appellants, amici had filed actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme discriminated against interstate commerce in violation of the Commerce Clause, U.S. Const. art. I § 8. Amici's refund actions were held in abeyance, however, pending final resolution of appellants' identical challenges to the tax in *Tyler*.

In that case this Court agreed with the position of appellants and amici that Washington's business and occupation tax violated the Commerce Clause,[2] remanding certain relief issues to the state court. On January 28, 1988, the Washington Supreme Court issued its final response to the *Tyler* remand, denying *any* tax refunds. The court asserted that since it chose to apply *Tyler* purely prospectively, the unconstitutional taxes collected prior to *Tyler* were "constitutionally collected." App. to J.S. at 3a. The present appeal involves the original appellants before this Court in *Tyler*. Just as in that case, resolution of this appeal will also have a direct effect on amici's pending refund actions.

Equipment Company, Monsanto Company, Onan Corporation, Ortho Diagnostic Systems, Ortho Pharmaceutical Corporation, Outboard Marine Corporation, Owens-Corning Fiberglas Corporation, Pacific Coca-Cola Bottling Co., Packaging Corp. of America, Pepsi-Cola Bottling Co. of Everett, Inc., Personal Products Co., Pitman-Moore, Inc., Pizza Hut of America, Inc., Quaker Oats Company, Inc., Sandvik Special Metals Corporation, S&C Electric Co., Stokely-Van Camp, Inc., Surgikos, Inc., Taco Bell Corp., Tektronix, Inc., Triangle Pacific Corp., USX Corporation, Vernell's Fine Candies, Western Bottling Co., Inc., and Woodtape Inc.

This brief is filed with the consent of all parties. Copies of consent letters are on file with the Clerk.

[2] Many of the amici joining in the present brief also participated as amici at the jurisdictional stage and on the merits in *Tyler*.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory state and local taxation, and from state court attempts to utilize jurisdictional and constitutional doctrines in order to permit states to enjoy the fruits of discriminatory taxation. Amici engage in extensive interstate commerce, and are subject to a wide variety of taxes imposed by states and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their pending refund actions, but also will affect state court responses generally to this Court's remands in the area of taxation. Thus, resolution of this appeal will impact upon the future development of state and local taxation practices in a manner that will have long-term significance for interstate commerce and the various activities engaged in by amici.

SUMMARY OF ARGUMENT

The court below, asserting the power to apply this Court's decisions *purely* prospectively, converted this Court's *Tyler* opinion into an advisory one. The decision below cannot be permitted to stand lest all future remands by this Court be construed as invitations, albeit unconstitutional ones, to convert this Court's decisions into advisory opinions.

Constitutional norms of adjudication, housed in Article III of the Constitution and the separation of powers doctrine, demand that this Court's decisions be applied to the actual parties before the Court. The court below emasculated these constitutional norms by denying refunds, based *solely* on its decision to apply *Tyler* purely prospectively, to the very parties who successfully challenged the tax before this Court. Moreover, as this Court recognized last term in *Griffith* v. *Kentucky*, 107 S. Ct. 708 (1987), these same constitutional norms require application of this Court's newly enunciated rules to all cases pending on direct review. *Griffith*'s reasoning is as applicable to the

civil context as to the criminal context in which it was decided, for Article III and the separation of powers doctrine do not vary depending on whether an adjudication is characterized as criminal or civil.

It is not necessary to resolve the constitutional issues lurking in the state court's decision because the state court erred in even invoking the prospective application doctrine. As demonstrated in appellants' Jurisdictional Statement, *Tyler* did not constitute a clear and unforeseeable break with past precedent. Thus, an inquiry into the proper retroactive application of *Tyler* played no legitimate role in the decision below. Because Washington law mandates refunds for taxes collected in violation of the Constitution, the actual *Tyler* litigants, and all parties whose refund actions were pending when *Tyler* was decided, are entitled to tax refunds.

Finally, the approach to Commerce Clause adjudication embraced by the court below cannot be permitted to stand because it contravenes the very purposes of the Clause. If state courts can *sua sponte* prospectively apply this Court's decisions finding state taxes unconstitutional, states will have every incentive to levy such taxes, secure in the knowledge that, with the aid of state courts, they can pocket the windfalls until this Court finds the taxes unconstitutional. Persons subject to the taxes will have little incentive to challenge them, and the taxes will affect the course of commerce between the states until this Court has explicitly overturned each one of them as unconstitutional. Thus, the decision below, with its inappropriate invocation and erroneous application of the prospectivity doctrine, not only violates Article III and the separation of powers doctrine, but also offends the Commerce Clause.

ARGUMENT

I. The Court Below Violated Norms Of Constitutional Adjudication By Applying This Court's *Tyler* Opinion Purely Prospectively.

The Washington Supreme Court interpreted this Court's remand in *Tyler* as a *carte blanche* invitation to convert *Tyler* into an advisory opinion. The state court refused refunds to the very parties who successfully had challenged Washington's unconstitutional tax before this Court, as well as the parties whose cases challenging the tax on the same grounds before the state court were held in abeyance pending final resolution of the underlying issues.[3] The decision below rested *solely* on the state court's misguided invocation of the doctrine of prospective application.

In essence, the state court is attempting to do what this Court itself cannot do—apply a Supreme Court decision *purely prospectively*. This Court is prohibited from rendering advisory opinions or declarations "on rights which may arise in the future." *In re Summers*, 325 U.S. 561, 567 (1945). *See also Federal Communications Comm'n* v. *Pacifica Foundation*, 438 U.S. 726, 734-735 (1978); 12 J. Moore, H. Bendix and B. Ringle, Moore's

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[3] The immediate appellants before this Court include 71 business enterprises that had brought 53 separate tax refund actions before the state court challenging the constitutionality of Washington's business and occupation tax. The Superior Court of Thurston County joined the 53 cases and granted the State's motions for summary judgment, dismissing the taxpayers' actions. On appeal to the Washington Supreme Court, the same 53 cases were consolidated, and three "test cases" were selected for state court review. When the Washington Supreme Court sustained the tax, the 71 appellants brought their challenge to this Court.

In addition to these 53 actions, other cases raising identical challenges to the state tax were filed in the state court prior to this Court's *Tyler* decision. These later cases were held in abeyance, however, pending final resolution of the underlying issues. Amici number among those taxpayers whose cases were thus abeyant.

Federal Practice ¶ 300.02 [2.-2] (2d ed. 1982). By refusing to apply *Tyler's* holding to the actual *Tyler* litigants and all similarly situated parties whose cases were pending when *Tyler* was decided, the state court has effectively converted *Tyler* into an advisory opinion. When viewed through the state court's spectacles, *Tyler* is reduced to a prediction that if Washington attempts to collect the same invalid tax, future taxpayers who challenge the tax will be entitled to refunds.

This Court has repeatedly recognized the impropriety of applying its holdings purely prospectively. In *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court refused to apply the new constitutional rule enunciated in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), to petitioners whose cases were pending or finalized the same day *Wade* and *Gilbert* were decided.[4] Speaking through Justice Brennan, this Court acknowledged that, except for future litigants, only Wade and Gilbert would benefit from the newly announced rule, but concluded that such a result was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." 388 U.S. at 301.

The assumption that, at a minimum, this Court's holdings must be applied to the immediate litigants is a long-standing and oftentimes unspoken one.[5] In fact, in for-

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[4] Of course, this Court's decision in *Griffith* v. *Kentucky*, *supra*, undercuts *Stovall* to the extent that *Stovall*, in dicta, would permit this Court to deny application of newly announced constitutional rules to parties whose cases were pending on direct review when the new rules were announced. However, *Stovall's* assumption that immediate litigants must enjoy new rules announced in their own cases to effectuate "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution," is still valid today. 388 U.S. at 301. *See, e.g., Griffith.*

[5] Even in cases now invalidated by *Griffith*, in which this Court had stated that newly announced rules for the conduct of criminal

mulating what Chief Justice Rehnquist has termed this Court's "retroactivity jurisprudence," *Griffith*, 107 S. Ct. at 717 (Rehnquist, C.J., dissenting), the Court's concerns have centered not on whether to apply a decision to the immediate litigants, but instead on how far back beyond the immediate litigants a decision must be applied.

As early as 1801 the Supreme Court acknowledged that a change in law must be applied to all cases pending on direct review. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). When the Court began to formulate its retroactivity doctrine in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), it assumed without question that all new rules were applicable to the immediate litigants *and* all litigants whose cases were pending on direct review. The only balancing or weighing of factors occurred in deciding whether to apply a new rule to a collateral attack of a final judgment. *Id.* at 627.

After *Linkletter*, this Court's retroactivity doctrine "became almost as difficult to follow as the tracks made

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prosecutions were inapplicable to cases pending on direct review, this Court assumed without question that the new rules were applicable to the litigants in the cases in which the new rules were first announced. *See, e.g., Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Johnson* v. *New Jersey, supra*; *United States* v. *Wade*, 388 U.S. 218 (1967), and *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Stovall* v. *Denno, supra; Katz* v. *United States*, 389 U.S. 347 (1967), and *Desist* v. *United States*, 394 U.S. 244 (1969); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *DeStefano* v. *Woods*, 392 U.S. 631 (1968); and *Chimel* v. *California*, 395 U.S. 752 (1969), and *Williams* v. *United States*, 401 U.S. 646 (1971).

Indeed, the only case in which this Court arguably has limited its holding to purely prospective application, *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), dealt solely with a pragmatic procedural matter. Thus, in every case involving substantive constitutional issues, this Court has assumed, at a minimum, that its decision must be applied to the immediate litigants.

by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U.S. 667, 676 (1971) (separate opinion of Harlan, J.).[6] However, individual Justices have repeatedly "asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule." *United States* v. *Johnson*, 457 U.S. at 545.[7] Last term in *Griffith*, this Court endorsed the views expressed in the past by several individual Justices and held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716.

This Court premised its holding in *Griffith* on the belief that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 713. However, this Court failed to explain why the

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[6] In his dissent in *Desist* v. *United States*, 394 U.S. at 257, which this Court subsequently endorsed in *United States* v. *Johnson*, 457 U.S. 537, 562 (1982), and *Griffith*, 107 S. Ct. at 713, Justice Harlan described the strange path of this Court's retroactivity doctrine:

> We have held that certain "new" rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker*, *supra*; *Tehan* v. *Shott*, 382 U.S. 406 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U.S. 80 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *DeStefano* v. *Woods*, 392 U.S. 631 (1968).

[7] For a list of examples of individual opinions housing this assertion, see *United States* v. *Johnson*, 457 U.S. at 545 n.9.

same "basic norms of constitutional adjudication" do not mandate a like result in the area of civil cases pending on direct review.[8] Indeed, this Court evinced a desire to adopt Justice Harlan's opinions in *Desist* v. *United States*, 394 U.S. at 256 (dissenting opinion), and in *Mackey* v. *United States*, 401 U.S. at 675 (separate opinion), yet in neither opinion did Justice Harlan advocate different treatment for civil cases pending on direct review than for criminal cases pending on direct review. In fact, his opinions suggest the opposite result.[9]

Griffith should be formally extended to civil cases because the constitutional and jurisprudential concerns mandating application of new rules to cases pending on direct review in the criminal area apply with equal force to the civil area. For example, in *Griffith* this Court echoed Justice Harlan's concerns that refusal to apply governing constitutional principles to all cases pending on direct review would be tantamount to legislating, not adjudicating. 107 S. Ct. at 713. The fact that prospective application of this Court's decisions violates the separation of powers doctrine is akin to the fact that it violates Article III's prohibition against advisory opinions. As

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[8] This Court failed to extend its *Griffith* holding to the area of civil retroactivity, terming that area governed by the factors enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). 107 S. Ct. at 713 n.8.

[9] In *Desist* v. *United States*, 394 U.S. at 258, Justice Harlan stated in his dissent, "Indeed, I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."

Likewise, in *Mackey* v. *United States*, 401 U.S. at 681, Justice Harlan stated in his separate opinion, "I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was."

this Court explained in *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968), "the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. See *Muskrat* v. *United States*, 219 U.S. 346 (1911) * * *." To the extent that the separation of powers doctrine mandates that new rules announced in the criminal area be applied to all parties whose cases are pending on direct review when the new rules are announced, it must mandate a like result in the civil area. After all, the separation of powers doctrine condemns with equal fervor judicial legislating in civil matters as well as in criminal. Advisory opinions are as constitutionally prohibited in civil cases as they are in criminal.

Moreover, extending *Griffith* to the civil area comports with this Court's

> judicial responsibilities "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U.S., at 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles." *Mackey* v. *United States*, 401 U.S., at 679 (separate opinion of Harlan, J.). [*United States* v. *Johnson*, 457 U.S. at 555.]

The same principle, of course, applies to others whose cases are being held in abeyance pending the outcome of certain litigated cases. Thus, in the case at bar it would make little sense to treat the parties who filed timely refund suits before the state court, raising identical constitutional challenges to Washington's business and occupation tax as appellants did, differently than appellants.[10]

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[10] In *Shea* v. *Louisiana*, 470 U.S. 51 (1985), this Court held that *Edwards* v. *Arizona*, 451 U.S. 477 (1981), was applicable to cases pending on direct review in state courts when *Edwards* was decided. Speaking through Justice Blackmun, this Court explained that "there is no difference between the petitioner in *Edwards* and the

Granting refunds to appellants but not to the parties whose identical cases were held in abeyance would not only violate the norms of constitutional adjudication identified in *Griffith* but would also foster perverse and wasteful incentives. Future litigants would feel compelled to race to this Court's doors or to file identical petitions or appeals as other parties have filed, increasing this Court's paperwork and wasting judicial resources.

As acknowledged in *Griffith*, it is impractical for this Court to "hear each case pending on direct review and apply the new rule." 107 S. Ct. at 713. Rather than "'[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule,'" this Court elicits the help of lower courts by commanding them "to apply the new rule retroactively to cases not yet final." *Id.* at 713 (quoting *Mackey* v. *United States*, 401 U.S. at 679 (Harlan, J., separate opinion)).

The court below, however, refused to do this and, unilaterally deciding to apply *Tyler* purely prospectively, failed to apply *Tyler*'s so-called "new" rule to the actual litigants and all other similarly situated parties whose cases were not yet final. If other lower courts were similarly permitted to evade this Court's explicit and implicit instructions on remand, this Court would be faced with the impracticable task, whenever it announced a new rule, of hearing every case pending on direct review in order to effectuate its judicial responsibilities identified in *Griffith*.

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petitioner in the present case." *Id.* at 60. Likewise, there is no difference between the present amici and the present appellants.

II. The Court Below Misconstrued This Court's Remand In *Tyler*.

The state court's interpretation of this Court's remand in *Tyler* leads not only to a result repugnant to the Constitution, but to one that is unreasonable as well. This Court granted the State a remand because of the possible validity of the State's argument that "the taxes at issue were assessed prior to * * * *Armco* and the holding in that case was not clearly foreshadowed by earlier opinions." 107 S. Ct. at 2822. However, on remand the state court did not consider whether *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984), was foreseeable or whether under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), taxes collected prior to *Armco* were exempt from the State's refund laws. Instead, the state court erroneously considered whether *Tyler* itself was foreseeable and whether any taxes collected prior to *Tyler* were exempt from the State's refund laws. This Court had already determined, however, not only that *Tyler* was foreseeable but that it was in fact *mandated* by *Armco*. *Tyler*, 107 S. Ct. at 2817. This Court's remand was certainly not an invitation for the state court to substitute its judgment on the foreseeability of *Tyler* for this Court's judgment.

In addition, the court below ignored this Court's guidance with respect to the appropriate factors to consider on remand. This Court found support for its decision to remand *Tyler* in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), and *Williams* v. *Vermont*, 472 U.S. 14 (1985).[11] In *Bacchus Imports* this Court held that Ha-

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[11] In considering whether a remand on the relief issue was appropriate in *Tyler*, this Court also noted *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985). In *Hooper*, the Court held that New Mexico's residence requirement in its statute exempting Vietnam veterans from a portion of the State's property tax violated the Equal Protection Clause. The Court remanded the case, however, to permit the state court to ascertain whether the unconstitutional portion was severable, entitling all qualified current

waii's tax exemption from its liquor excise tax for okolehao and fruit wines violated the Commerce Clause. The Court remanded the case, however, to determine whether the petitioners merited the refunds they sought.[12] The remand was based on the fact that the record was incomplete on the refund issue and on this Court's recognition that federal constitutional issues could be obviated by state law. "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

Likewise, the same basic concerns prompted this Court's remand in *Williams* v. *Vermont*, in which the Court held that on its face Vermont's statute, providing a residency restriction on the availability of a sales tax credit for use tax paid to another state, violated the Equal Protection Clause. However, the record did not establish whether the statute actually operated in a discriminatory manner. For this reason and "in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, see *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984)," this Court did not resolve the issue of appropriate remedies. *Id.* at 28.

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resident veterans to the tax exemption, or whether the entire veterans' tax exemption statute had to fall.

[12] In *Bacchus Imports*, the State argued that the petitioners were "not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay within a certain time." 468 U.S. at 276-277. The petitioners countered that they were entitled to refunds because they were legally obligated to pay the tax, regardless of whether their customers paid their bills and, in fact, the discriminatory tax "worked a competitive injury on their business." *Id.* at 277. In addition, they argued that the Commerce Clause dictates refunds for taxes collected in violation of the Clause. This Court, however, did not resolve the refund dispute, in part because these very issues "were not addressed by the state courts." *Id.*

This Court's primary concerns in remanding *Tyler* (in reliance on *Bacchus* and *Williams*) were thus (a) the adequacy of the record to determine refunds and (b) the possibility that state law might resolve the refund issue and thereby eliminate the need for this Court to decide the federal constitutional aspects of that issue. 107 S. Ct. at 2822-23. The court below considered the first of this Court's concerns not implicated in this case, and sought to extricate itself from the other primary concern. Although concluding that state law demanded refunds for taxes paid in violation of the state or federal Constitution, App. to J.S. at 2a-3a, the state court attempted to evade state law by engaging in the unsupported and novel fiction that if it chose to apply this Court's decision in *Tyler* purely prospectively, taxes collected prior to *Tyler* were "constitutionally collected." App. to J.S. at 3a.

Certainly this Court's remand did not explicitly or implicitly invite the state court to apply *Tyler* purely prospectively. Moreover, as demonstrated above, the state court violated Aricle III of the Constitution by effectively converting this Court's decision into an advisory opinion and, in the process, violated the separation of powers doctrine by applying the decision as a legislative pronouncement rather than as an adjudication on the merits. The state court certainly violated "basic norms of constitutional adjudication," which demand that this Court's decisions be applied to the immediate litigants and all parties whose cases are pending on direct review. *Griffith*, 107 S. Ct. at 713.

III. The Court Below Erred In Even Invoking The Doctrine Of Prospective Application And, In the Process, Offended The Commerce Clause.

This Court's retroactivity jurisprudence is at issue only because the state court erroneously invoked the doctrine of prospective application. This doctrine should have played no role whatsoever in the state court's decision.

The issue of prospective application of a federal court decision is only relevant if that decision announces a new and unanticipated rule of law. *See, e.g., United States* v. *Johnson*, 457 U.S. at 549; *Chevron Oil Co.*, 404 U.S. at 106; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968). This requirement is not to be taken lightly. For the prospective application doctrine to be applicable, the new shift in doctrine must "constitute an entirely new rule which in effect replaced an older one." *Id.* at 498.

As appellants demonstrated in their Jurisdictional Statement, *Tyler* cannot be read as "a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe*, 392 U.S. at 499. In fact, this Court explicitly concluded that *Armco required* the result in *Tyler*. *Tyler*, 107 S. Ct. at 2817. Certainly this Court did not construe its *Tyler* opinion as announcing a new and unanticipated break with past precedent. Nor did this Court invite the state court to consider this issue; this Court remanded on the State's argument that *Armco*, not *Tyler*, may have been unforeseeable and that refunds for taxes collected prior to *Armco*, not *Tyler*, may not be mandated. *Tyler*, 107 S. Ct. at 2822.

In essence, this Court is confronted with a state court that erroneously invoked the doctrine of prospective application *and* erroneously interpreted the contours of that doctrine. Not only did the state court's decision violate constitutional norms of adjudication but it also offended the Constitution by threatening the goals of the Commerce Clause.

As explained in appellants' Jurisdictional Statement, the state court's application of the *Chevron* factors, if permitted to stand, would enable all state courts to discriminate against interstate commerce risk-free. States would have an incentive to impose taxes in violation of the Commerce Clause, secure in the knowledge that if

this Court one day finds the state's tax unconstitutional, the state court need only enunciate a formula (that the state court itself did not foresee this Court's decision) to retain the fruits of its unconstitutional tax.[13] Knowledge of this possibility could certainly chill interstate trade, thus undermining the central purpose of the Commerce Clause—to create an area of free trade among the states. *American Trucking Ass'ns* v. *Scheiner*, 107 S. Ct. 2829, 2839 (1987). Business entities might avoid transacting business in states imposing such taxes, preferring to wait until this Court explicitly strikes the taxes down, rather than pay the taxes until this Court overturns them, with no realistic hope of refunds.

Moreover, interstate commerce concerns demand that *Tyler* be applied to all parties whose cases challenging Washington's business and occupation tax were pending when *Tyler* was decided. Free trade among the states is chilled if entities believe that states can ignore their own refund statutes and refuse refunds to all challengers or to all challengers save the one lucky challenger who managed to win this Court's ear. In addition, if state courts can ignore their refund statutes and apply this Court's pronouncements on unconstitutional taxes solely to the actual litigants before this Court, states have the same risk-free incentive to impose taxes in violation of the Commerce Clause. The state court could pick as a test case the one challenge with the smallest refund at stake, and thus ensure that even if that challenger successfully presented its case to this Court, the state need only pay one small refund, retaining the bulk of its unconstitutional windfall.

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[13] The court below rested its finding that "the *Tyler* decision established a new principle of law overruling past precedent on which litigants may have relied," and thus was amenable to prospective application, on the bootstrap assertion that it "did not read *Armco* as foreshadowing the result in *Tyler*." App. to J.S. at 4a, 5a.

The decision below cannot be permitted to stand. It effectively undermines the goals of the Commerce Clause. It also enables lower courts to do what this Court itself cannot do—convert this Court's decisions into advisory opinions and, in the process, violate Article III and the separation of powers doctrine. In addition, the state court's decision to deny refunds to appellants *and* the parties whose cases were pending when *Tyler* was decided exhibits an utter disregard for this Court's constitutional norms of adjudication. The potential damage to interstate commerce and our constitutional system, should the decision below stand, far outweighs the value of any refunds now at issue.

CONCLUSION

For the foregoing reasons, and those in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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